2001

Nile Chapman, Roger Chapman, and The Eugene Harmston Trust v. Uintah County, Commonwealth Land title Insurance Company, and Basin Land Titile & Abstract, INC., : Reply Brief

Utah Court of Appeals

Daniel S. Sam; James A. Beckwith; Attorney for Appellants.
Clark B. Allred; Mackeachnie, Allred, McClellan & Trotter; Richard A. Rappaport; Leslie Van Frank; Cohne, Rappaport .

IN THE UTAH COURT OF APPEALS

NILE CHAPMAN, ROGER CHAPMAN, and THE EUGENE HARMSTON TRUST,	)	Appeal No. 20010816-CA
Plaintiffs/Appellants,	)	Case No. 990800255
VS.	)	Priority No. 15
UINTAH COUNTY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, and BASIN LAND TITLE & ABSTRACT, INC.,	)	
Defendants/Appellees	)	

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENTS OF THE EIGHTH JUDICIAL DISTRICT HON. A. LYNNE PAYNE, PRESIDING.

ORAL ARGUMENT IS REQUESTED

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I. *CULP CONSTRUCTION* DOES NOT SUPPORT APPELLEES' ARGUMENT

Nearly the entirety of argument by Commonwealth Land Title Insurance Co. ("Commonwealth") and Basin Land Title & Abstract, Inc. ("Basin")is premised upon the decision in *Culp Construction Co. v. Buildmart Mall* 795 P.2d. 650 (Utah, 1990). It is these parties' position that *Culp* contains three holdings that immunize them from Appellants' claims in this matter. However, *Culp* is not the "be all, end all" panacea as claimed by Appellees. Its essential holding - that independent tort claims for negligent misrepresentation may lie against a title insurer - is contradictory to these parties' position in this proceeding. Indeed, the conduct of the title insurer in *Culp* - upon which this holding is based - is strikingly similar to the conduct here involved by Commonwealth and Basin.

In *Culp*, First Security Bank loaned funds to build a retail shopping mall and recorded its first lienholder position. Before completion of construction, however, it became obvious that there would be a $500,000 shortfall. Tower Federal Savings agreed to loan $750,000 and take a second lienholder position immediately behind First Security. Lawyers Title, acting through its local agent Richmond Title, was engaged to issue both a Commitment for Title and a Title Policy to Tower Federal. The Title Commitment revealed various liens and encumbrances which were apparently not objectionable to Tower Federal. The closing was scheduled and the Title Policy was to be issued. Then, two events occurred.

First, Tower Federal instructed Richmond Title to put the $750,000 loaned funds into

an escrow account and to disburse them to the borrowers only when Richmond determined that: (a) Tower would be in a second lienholder position immediately behind First Security Bank; and, (b) that the only exceptions to the Trust Deed would be those liens and encumbrances identified in the Commitment for Title.

Second, various third parties recorded mechanics liens against the real property. These mechanics liens were apparently not those liens or encumbrances listed on the Title Commitment. These liens were, however, of public record and readily ascertainable through a title search. Richmond either did not conduct such a title search or in fact did conduct a title search, discovered the recorded mechanics liens but chose not to disclose these liens to Tower Federal. Whichever, Richmond Title did not list the mechanics liens in the Title Policy - either directly or as exclusions. Instead, Richmond Title closed the loan and distributed the $750,000 escrowed funds. (Sound familiar?)

Subsequently, the construction project failed. In the ranking of lienholders, Tower Federal found itself subordinate to the third party mechanics lien holders. Tower Federal sued Lawyers Title (and Richmond Title as its agent) for breach of contract and negligent misrepresentation.

Lawyers Title and Richmond Title, as here, insisted that its liability was in all circumstances limited to the terms of the contract. The Supreme Court disagreed, vacated the trial court's summary judgment, and made the following ruling:

> In *Beck* [*v. Farmers Insurance Exchange* 701 P.2d. 795 (Utah, 1985)] we held that 'in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary. Without

> more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort'. However, our holding *Beck* does not preclude the bringing of a tort claim independently of a contract claim. In *Beck*, we specifically stated: 'We recognize that in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort.' Statutory requirements that give rise to independent causes of action under various unfair practices may also give rise to independent tort actions.
>
> Negligent misrepresentation occurs 'where one having a pecuniary interest in a transaction is in a superior position to know material facts, and carelessly or negligently makes a false representation concerning them, expecting the other party to rely and act thereon, and the other party reasonably does so and suffers loss in that transaction....' Furthermore, 'privity of contract is not a necessary prerequisite to liability'.
>
> We hold that summary judgment on the issue of negligent misrepresentation was inappropriate because our decision in *Beck* does not preclude a separate independent tort. In addition, material factual issues remain as to whether Lawyers Title owed a contractual duty to Tower to represent the true status of the title upon receipt and acceptance of the escrow instructions and at all times thereafter when Lawyers Title knew, or in the exercise of reasonable diligence should have known, of additional mechanic's liens against the subject property. Should it be determined that Lawyers Title owed Tower a duty of disclosure, other questions of material fact also exist, including whether that duty was breached and whether Tower reasonably relied upon the commitment, thereby defeating a motion for summary judgment. (795 P.2d. at Pgs. 654-655).

The above quotation reveals the two true rulings in *Culp.* First, a title insurer's liability is not limited solely to the terms of the insurance contract of insurance. Instead, the title insurer may be subject to a claim for negligent misrepresentation. Damages attributable to negligent misrepresentation are not limited to damages specified in the contract. The damages may include reasonable attorney's fees incurred by the insured in defending or prosecuting the title based upon the title insurer's negligent report of title. SEE: *South*

Sanpitch Co. v. Pack 765 P.2d. 1279, 1283 (Utah App., 1988) [adopting the "third party tort rule" in the context of negligent misrepresentation in a title insurance context].

Second, the title insurer may bear a contractual duty to represent the true status of the title. Although *Culp* refers to this duty in the context of Tower Federal's specific written escrow instructions, it is clear from other decisions that a title insuror has such a duty independent of any written instructions. Sec. 31A-20-110(1),, U.C.A.; *Christensen v. Commonwealth Land Title Ins. Co.* 666 P.2d. 302 (Utah, 1983)

The argument by Commonwealth and Basin - that *Culp* immunizes them from mistakes in title reporting - is clearly without merit. *Wycalis v. Guardian Title* 780 P.2d. 821 (Utah Ct.App. 1989) *cert denied* 789 P.2d. 33 (Utah, 1990); *Christensen (Supra)* and, *Beck (Supra)* have not been overruled or vacated by the Utah Supreme Court. Therefore, like statutes, these decisions - including *Culp* - must be read *in pari materia*. Doing so reveals a Utah rule of law far different from that argued here by Commonwealth and Basin.

II. THE STANDARD OF CARE WAS FIXED BY LAW

Under *Wycalis*, the applicable standard of care in negligence cases - particularly those involving title insurers - is "fixed by law" when created by either statute or prior appellate decisions. (780 P.2d. at Pg. 824) Under Sec. 31A-20-110(1), U.C.A., the title insurer has a duty to perform a reasonable search and examination of the title, for the purpose of determining insurability of title under sound underwriting principles. Under *Christensen*, the title insurer may be liable to the insured for failing to report the "readily ascertainable facts" of the title to land when: (a) such facts exist within the public records pertaining to the

property; and, (b) the title insurance company has been engaged or has commenced to make a report of such "readily ascertainable facts" of public record. (666 P.2d. at Pg. 305); *Jardine v. Brunswick* Corp. 18 Utah 2d. 378, 381, 423 P.2d. 659, 662 (1967); *Arizona Title Insurance and Trust Co. v. O'Malley Lumber Co.* 484 P.2d. 639, 645 (Ariz.App. 1971)

Appellees assert that *Wycalis* and *Christensen* are inaposite since they deal with "mere bookkeeping". However, neither of these decisions find a difference between "internal books and records of the title insurer" and the "books and records of the County Recorder researched by the title insurer". The duty to make a full search - and render an accurate report of the facts ascertainable from such a search - remains the same in both instances.

Commonwealth and Basin assert that Chapmans and the Harmston Trust ("Chapmans", collectively) failed to submit expert testimony on the standard of care applicable to title insurors. This argument is also without merit. The Chapmans submitted the admissions of Ms. Gardiner that the title searcher's discovery of the recorded D Road Resolution - but her failure to report that discovery - was not in comportment with the search standards of Commonwealth or Basin. More importantly, the duty to make a full report was "fixed by law" under both Sec. 31A-20-110(1) and *Christensen.*

III. ABSTRACTING WAS A DISPUTED FACTUAL ISSUE

Commonwealth and Basin chide - if not scold - the Chapmans for referring to Sister States' decisions defining "abstracting". There is nothing wrong in giving such citations. The Utah Code does not define "abstracting". *Culp* at Pg. 654. Oklahoma, however, does license "abstractors" and "abstract companies". In Oklahoma, "abstracting" includes the

reviewing of recorded documents, interpreting their legal signficiances and reporting those conclusions to the client. *American Title Insurance Co. v. M-H Enterprises* 815 P.2d. 1219 (Okla. 1991)

Compare this Oklahoma definition with the full definition of "abstracting" quoted in *Culp* but omitted by Commonwealth and Basin in their *Reply Brief*: (*Appellees' Brief; Pg. 19)*

> (a) condensed history of the title to land, *consisting of a synopsis or summary of the material or operative portion of all the conveyances, of whatever kind or nature, which in any manner affect said land,* or any estate or interest therein, together with a statement of all liens, charges, or liabilities to which the same may be subject, *and of which is in any way material for purchasers to be apprised. (Emphasis Supplied)* (795 P.2d. at Pg. 654)

In other words, the summarizing or determination of what portions or provisions of a recorded document are "material" or "operative" to a title report or the chain of title or the exclusions from a title policy may constitute "abstracting". In *Culp*, the Supreme Court held that this may occur when the title insurer voluntarily assumes to compare the title reports in the Commitment for Title and the Title Policy to determine if they are the same, or different. Here, the issue is whether Basin's titling agent - Ms. Joyce Gardiner - made such a "synopsis or summary" of the "material or operative portions" of the records by stating: "No County Road Exists On the Property". Similarly, the issue is whether Basins's title searcher - Ms. Wanda Merkley - committed an act of "abstracting" by failing to report the existence of the

Uintah County D Road Declaration.[1]

Given the elements of negligent misrepresentation - a tort independent of the contract of insurance - the presence or absence of written "abstracting" instructions is irrelevant. The operative standard in the tort of negligent misrepresentation is the state of mind of the insured, and not the insurer. "What facts was the insured reasonably led to believe existed from the statements made by the insurer?" As in *Culp*, the noteworthy and relevant determination is whether the acts, or statements, of the title insurer amounted to a representation to the insured of a conclusion made from examining the public records. (795 P.2d. at Pgs. 654-655) This is a factual question, requiring determination by the jury after trial and not by the court under a summary judgment standard. *Culp, Wycalis (both Supra).*

IV. THE CHAPMANS DID NOT LIMIT THEIR APPEAL

Commonwealth and Basin assert here that only a portion of the judgment was appealed. SEE: *Reply Brief;* Pg. 19, Fn. 6) That assertion is without merit. The Chapmans appealed the entirety of the Commonwealth judgment rendered by the Eighth District Court. The Chapmans' *Notice of Appeal* clearly so denotes.

V. DISMISSAL OF THE ACTION WAS SUFFICIENT PREJUDICE

Commonwealth and Basin do not deny that they engaged in conduct constituting a

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[1] Ms. Gardiner admitted in her deposition that Ms. Merkley was given independent authority to report only those documents which Ms. Merkley determined to be "relevant and material". Determining what documents are "relevant and material" is an act of "summarizing" the operative provisions of a legal instrument - in short, "abstracting".

waiver of arbitration under *Chandler v. Blue Cross Blue Shield of Utah* 833 P.2d. 356, 360 (Utah, 1992). These actions included: filing an Answer without asserting this affirmative defense; failing to seek suspension of court proceedings under Sec. 78-31a-4, U.C.A.; engaging in discovery which is not otherwise allowed in arbitration; and, making their motion for summary judgment. Commonwelath and Chapman assert, however, that the Chapmans have not sustained prejudice. This argument is not simply without merit. It is absurd.

"...Any real detriment is sufficient to support a finding of prejudice...."which will support a waiver of arbitration. *(Chandler* at Pg. 360) As in *Harting v. Barton* 6 P.3d. 91, 96 (Wash.Appeals, Div. 3, 2000) Commonwealth and Basin successfully obtained dismissal, with prejudice, of all claims made by the Chapmans - which, itself, is sufficient prejudice. As a result, Appellants do not have any claims to make in arbitration.[2] What greater detriment could there be?

RESPONSE TO BRIEF OF UINTAH COUNTY

VI. WHICH ORIGINAL SUPREME COURT DECISION GOVERNS?

Sec. 72-5-104, U.C.A., reads the same now as it did in the time of *Wilson v. Hull* 7 Utah 90, 24 P. 799, 800 (1890) *Schettler v. Lynch* 23 Utah, 305, 64 P. 955 (1901) and *Morris v. Blunt* 161 P.. 1127 (Utah, 1916). As interpreted in *Wilson* and *Schettler*, there were but

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[2] The Chapmans admit that, subsequent to dismissal with prejudice of all their claims against Commonwealth and Basin, Commonwealth demanded arbitration of those very same claims. The Chapmans have consistently denied any jurisdiction in arbitration - since they do not have legal claims that can be made.

three elements: which did not include the landowner's acquiescence in the public's use. As interpreted in *Morris*, 26 years later, there were four elements to prove under this statute. The fourth element was the landowner's consent or acquiescence to the public use. (*Morris* at Pg. 1131) Since *Morris* was rendered by the same court after the rendition of *Wilson* and *Schettler*, the decision in *Morris* must be considered as overruling these two prior decisions.

Uintah County nowhere responds to this paradox. Instead, the County merely cites *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches* 639 P.2d. 211, 213 (Utah, 1981) and *Thurman v. Byram* 626 P.2d. 447, 449 (Utah, 1981) as controlling all subsequent interpretations of Sec. 72-5-104 (or its predecessor Sec. 27-12-89). That is not sufficient response, when *Bertagnole* and *Thurman* are based upon *Wilson* and *Schettler* and these latter cases were overruled by *Morris v. Blunt (Supra)*. It is even less sufficient when *Heber City v. Simpson* 942 P.2d. 307, 310-311 (Utah, 1997) ruled that the "permissive use element" was retained in the law governing claims under Sec. 72-5-104.[3]

At issue here is the basic conception of Sec. 72-5-104. Is it a codification of the common law of "easement by adverse use": which doctrine in Utah requires the absence of acquiescence by the landowner? Or, is Sec. 72-5-104 a "strict liability" statute under which a public highway can be created in defiance of gates, fences or landowner acquiescence?

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[3] In *Heber City*, the "permissive use" was limited to "owners of adjoining property" whose use of a road may be by prescriptive or documentary rights or by permission of the landowners. 942 P.2d. at Pg. 312 Ironically, the precedent for this ruling was cited by the Court as *Thurman (Supra)* and *Peterson v. Combe* 20 Utah 2d. 376, 438 P.2d. 545, 547 (1968).

None of the appellate decisions since *Morris* have resolved this question - and nowhere in its *Reply Brief* does the County even address this issue. Yet, the conception of Sec. 72-5-104 - or the legislative and public policy for its enactment - is the very issue raised by the Chapmans in the trial court and here by appeal.

The Chapmans assert that Sec. 72-5-104 is merely a codification of the common law rule of easement by adverse use. That doctrine, while applied most frequently to private easements, is nonetheless available to create public easements over private land. Two fundamental elements of this common law theory is that the use must be adverse - or "hostile" (without force of arms) - and without permission or acquiescence by the landowner. This was recognized in *Morris (Supra)*.

Contrary to the County's position, acquiescence by the landowner was also recognized - and deemed material - by the Supreme Court in *Heber City (Supra)*. There, Heber City owned land used for its municipal airport. To access the Airport, the public had traveled across a portion of the municipally-owned land creating what was referred to as "Airport Road". Airport Road was adjacent to the Simpsons' property but not on the Simpsons' property. To extend the runway, Heber City condemend a portion of the Simpsons' property, and also closed Airport Road. In condemnation, the Simpsons claimed that Airport Road was a public highway and its existence enhanced the value of their condemned property.

In determining the case, the Supreme Court reviewed that portion of *Morris* (161 P. at Pg. 1130) which discusses public vs. private use of a road, together with the Supreme

Court's ruling in *Draper City (Supra)* which held that use of the road by adjoining property owners was not considered "use by the public". *Draper City* 888 P.2d. at 1099. Heber City was obviously an adjacent property owner, but the use at issue was by the public to access businesses other than the airport (a gun club; a junkyard) or for other travel: e.g. horse riding; hauling hay; etc. (942 P.2d. at Pg. 310) As to use for access to and from the airport, the Supreme Court stated in Footnote 10 (942 P.2d. at Pg. 812), as follows:

> Fn. 10: Under the facts of the instant case, the public's use of the Airport Road simply to go to and from the airport is of the permissive nature that will not lead to a dedication and abandonment to the public, as this is precisely how Heber City wanted the road used. *See Gillmor v. Carter* 15 Utah 2d. 280, 391 P.2d. 426, 428 (1964) (finding owners' '...agreement with duck clubs granting permission to use...' road across their land to be inconsistent with statutory requirements for dedication of public highway) Therefore, evidence regarding this use of the road is irrelevant to our consideration of whether the Airport Road was used as a public thoroughfare. *(Italics in Original)*

It is noteworthy that the "use" discussed in Footnote 10 was not use by airport or municipal employees in their official capacity at the airport. Such use would be use by the landowner itself. Instead, it was use by the general public at the permission of the landowner. Footnote 10 clearly delineated that the public's use for that purpose was permissive - as was similar travel in *Gillmor v. Carter* [4]. Thus, use by the public at the landowner's permission or acquiescence negated "dedication by user" under Sec. 72-5-104!

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[4] In *Gillmor*, a road traversed private property leading to Great Salt Lake. The landowner had given permission to duck clubs to use the road to access Great Salt Lake. Mr. Carter argued that such permission constituted a "dedication" by the landowner. The Supreme Court disagreed on the grounds that the duck club's use was permissive. The Supreme Court also cited the landowner's erection of gates (albeit unlocked) and posting of No Trespassing signs along the route of the road.

In short, the landowner's consent or acquiescence in public use of a road does remain a viable, and necessary, element of dedication by user under Sec. 72-5-104. The Utah Supreme Court has upheld this requirement, in one form or another, in several decisions, including *Heber City* in 1997. Without this requirement (that there not be acquiescence in public use), Sec. 72-5-104 would "trample lightly upon the rights of private property".

Yet, that is precisely what Uintah County argues in its *Reply Brief.* The County interprets Sec. 72-5-104 as a "strict liability" statute: i.e., that a public highway is created if, over 10 continuous years, the public has traveled the road regardless of how the public got on the road. Under the County's interpretation, it does not matter whether access was by trespassing - including the opening of gates or breaking down of fences - or by obtaining consent of the landowner to use the road. So long as the public crossed the road for 10 consecutive years - even if only by consent of the landowner - the road is a "public highway" - at least according to Uintah County.

Clearly, the County's interpretation - and the trial court's acceptance by refusing Appellants' Proposed Jury Instructions 5, 6 and 7 - is contrary to a continuing line of Supreme Court decisions interpreting Sec. 72-5-104 as requiring the absence of landowner consent or acquiescence to the public's use of the road. Sec. 72-5-104 is a codification of "adverse user" and is not a "strict liability" statute as urged by Uintah County. Accordingly, the trial court's jury instructions which omitted this necessary element of proof were erroneous. The error was material, since the jury was told - and the Chapmans prohibited from arguing otherwise - that the landowner's consent was wholly immaterial.

VII. THE COUNTY FAILS TO MARSHALL TESTIMONY TO SUPPORT LAW

A. Absence of Citations to the Official Transcript

Uintah County fails to provide citations to the Official Transcript when claiming that certain witnesses testified in a specific manner. Such failure voids and negates Uintah County's allegations of such testimony.

B. Different Sections of Wyasket Bottom Road

Uintah County commits here the same error it committed in the Eighth District. Uintah County refers to use of Wyasket Bottom Road knowing that that Road has two different sections - only one of which is actually at issue in this proceeding. Whether the error is intentional or otherwise, the result is the same. Uintah County seeks to mislead the Court on the claimed use of the land route across the Chapman and Harmston properties.

The Chapman/Harmston properties lie north of Wyasket Bottom. For trial purposes, the parties stipulated that the road across these properties would be referred to as "North Wyasket Bottom Road". This was to conveniently distinguish the land route at issue from "South Wyasket Bottom Road", which, by its name, lies south of Wyasket Bottom.

Ignoring these distinctions, Uintah County asserts here that several witnesses either used or observed others using the land route across the Chapman/Harmston properties - when, in fact, these witnesses were on South Wyasket Bottom Road and not North Wyasket Bottom Road. Mr. Gene Nyberg, for example, testified that he never graded north of Louie Hall's Ranch. Trial Exhibit No. 2 located the Louie Hall Ranch 1 mile south of Wyasket Bottom on South Wyasket Bottom road. Mr. Nyberg never testified that he traveled the land

route across the Chapman/Harmston properties.

Neither Mr. Leonard Heeny nor Mr. David Rasmussen were even certain they had ever used the land route across the Chapman/Harmston properties. (TR: 227, Lns. 5-23; 232, Lns. 204; 231, Lns. 18-23) In the period 1960-82, Gilbert Brough traveled through the area as a shortcut to Vernal. However, he testified that the road he traveled was maintained by Uintah County road graders. (TR: 69: Lns. 7-18) Since Gene Nyberg only graded South Wyasket Bottom Road - and not North Wyasket Bottom Road - then the conclusion is obvious. Mr. Brough did not travel across the Chapman/Harmston properties.

C. The Use Was Not "By The Public"

Mr. Greg Harmston testified to gates being across the road from the 1950's (when entry under Homestead occurred) to the 1970's. The removal of the gates occurred only after execution of a written easement was given by the Harmstons and Mr. Fredrickson to the oil company. Although testifying that the road was used by Refuge personnel, such use was consensual to the Refuge as an abutting landowner. *Morris v. Blunt* 161 P. 1127 (Utah, 1916) *Heber City v. Simpson* 942 P.2d. 307 (Utah, 1997) Mr. Harmston did admit that the road across the Chapman/Harmston properties was, in fact, "...used..." by others. However, Mr. Harmston never testified when such use occurred, how long such use occurred or for what purpose such use occurred or even the supposed identity of the users (i.e., non-Refuge employees or visitors, and oilfield personnel other than the company holding an easement across the properties). These are critical elements of proof placed upon Uintah County under *Morris* and *Heber City,* and for which the proof must be "clear and convincing".

Uintah County's effort to support the jury's verdict by other witness testimony is based on an additional error. Under *Morris* and *Heber City (both Supra)* use of the land route by adjoining landowners is not considered "public use", since the adjoining landowner may either have a prescriptive right of use or consent for his use. Indeed, in *Heber City,* (Fn. 10, 942 P.2d. at Pg. 812), the Supreme Court noted that the landowner's consent to use negated the basis of "dedication by user" under Sec. 72-4-105. The Supreme Court noted that, in *Heber,* the road was on land owned by Heber City and intended by Heber City to be used by the public to access the Heber City Airport. Such public use, ruled the Supreme Court, was not competent to meet the criteria under Sec. 72-4-105.

The testimonies of Val and Chad Smuin, Dan Alonso, Herb Troester, Gary Meacham and other of the County witnesses were thus incompetent to satisfy the "public use" standard of Sec. 72-4-105. Dan Alonso did not assume his duties until 1998: beyond the "continuous use" period found by the jury (1960-98). Herb Troester not only testified to erecting gates across The Road, but also that, as Refuge Manager, the Refuge desired the road to be used by Refuge visitors to access Johnson Bottom (north of the Chapman property) and Bull Durham Flats (lying between the Harmston/Chapman properties). Gary Meacham, a Refuge employee, used the road to access The Refuge for his personal hunting, and only 2-3 times between 1995-2001 for "sightseeing". The Smuins were upon the property only after they had obtained specific consent of the landowners (Harmston; Chapman; or, Fredrickson) to hunt on the properties. Clay Hacking, as a child, was on the road with his father, a Refuge employee, when his father was on Refuge business prior to 1976. Clay Hacking drove across

the road 1976-1982 but not again until after 1994: i.e., not ten consecutive years.

The County's assertion that gates and signs were never encountered is also without substance. The existence of gates across the road over Appellants' property was admitted by several of the County's witnesses at trial. SEE: Pgs. 25-28, *Appellants' Opening Brief* Mr. Greg Harmston further testified that No Trespassing signs were posted at the entrances and exits to and from Appellants' property, although they were torn down with great frequency.

What the Chapmans' summary of testimony - the "marshaling of evidence" referred to by Uintah County - reveals is that the jury's determination that "continuous public use" occurred between 1960 and 1998 cannot be supported by any of the evidence presented at trial. In other words, the trial evidence nowhere reveals a block of 10 continuous years during which the County's witnesses continuously used the road over the Chapman and Harmston Trust properties as a "public thoroughfare".

VIII. EXHIBITS 4 AND 5 HAD PROPER FOUNDATION

Uintah County's claim that the Chapmans did not provide a proper foundation for the admission of their Trial Exhibits 4 and 5 is without merit. The Chapmans' Proposed Trial Exhibit 4 was a certified copy of an Easement granted in 1973 by Frederickson and Harmston to Gulf Oil Corp. (*Opening Brief*; Appendix J, Pg. 18) The Chapmans' Proposed Trial Exhibit 5 was a certified copy of an Easement granted in 1996 by Harold Fredrickson to Chandler & Associates, Inc. (*Opening Brief*; Appendix K, Pg. 24)

Certified copies of records held in the Uintah County Recorder's Office are self-authenticating and admissible without further proof under Rule 902(4), U.R.E. Mr. Greg

Harmston testified to his personal knowledge of the grant of an easement to Gulf Oil Corp. in 1972-73. Having provided these bases for admission, the trial court should have admitted the documents without further ado.

What the trial court held, however, was that the "foundation" required was not the certification by the Uintah County Clerk & Recorder nor the personal knowledge of the creation of the easements by Mr. Harmston. Instead, the trial court held that the foundation, under the Utah Rules of Evidence, must come from a holder of the easement and his actual and specific use of the easement. Neither the trial court nor Uintah County, in its *Reply Brief*, provide any legal authority for these foundation requirements.

IX. APPEAL OF THE COUNTY JUDGMENT IS NOT MERITLESS

A frivolous appeal under Rule 33, U.R.A.P., is one without reasonable legal or factual basis. *O'Brien v. Rush* 744 P.2d. 306 (Utah Ct.. App. 1987); *Backstrom Family, Ltd. Partnership v. Hall* 751 P.2d. 1157 (Utah. Ct. App. 1988). Sanctions under Rule 33 should be applied only in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions. *Porco v. Porco* 752 P.2d. 365 (Utah Ct. App. 1988)

The focal issue in the Chapmans' appeal of the Uintah County Judgment is the Eighth District's refusal to instruct the jury on the fourth element of "dedication by user". *Morris v. Blunt (Supra)* Chapmans have cited a continuing line of Supreme Court decisions holding that landowner acquiescence is a vital and necessary element of "dedication by user" under Sec. 72-5-104. This appeal seeks to clarify existing law, or, in other words, to eliminate the confusion over "four vs. three" elements under Sec. 72-5-104. Such intention, when coupled

with undisputed legal authority, is not a "meritless appeal".

CONCLUSION

A. Commonwealth and Basin Land Title

The Chapmans' claims against these defendants arise from undisputed errors and omissions by personnel of Basin Land Title, acting as agents of Commonwealth. Basin Land Title and Commonwealth were engaged, and paid, by the Chapmans to research the official public records for the Fredrickson property. Basin's personnel discovered and copied the Uintah County D Road Resolution, which Basin's personnel understood created a "public road" over the Fredrickson property. However, Basin's title searcher never reported this discovery to the licensed titling agent, and Basin had given that title searcher the power to not disclose any document deemed by her to be "irrelevant". Basin's titling agent then made a statement that, arguably, could be construed as rendering an opinion on the status of title: to wit, "No Public Road Exists On Property". This statement was undeniably made by the titling agent in complete ignorance of the D Road Resolution recorded by Uintah County, and indexed for the Fredrickson property.

Commonwealth and Basin Land Title have not provided cogent, controlling legal authority supporting the Eighth District's grant of summary judgment in their favor. *Culp Construction (Supra)*, upon which Commonwealth and Basin base their entire argument, does not merely "not support" their argument - that decision in fact militates against the dismissal of the Chapmans' claims against these defendants. *Culp* does not immunize or exonerate a title insuror from mistakes in issuing title policies, as claimed by Commonwealth

and Basin. Instead, *Culp* authorizes the filing of claims for negligent misrepresentation and breach of contract under the same circumstances as are here involved.

The Eighth District's summary judgment, therefore, was not merely "improvidently granted". It was, instead, clearly erroneous. The Eighth District created a standard of care not recognized within the State of Utah: i.e., that title insurors need not review all recorded documents and need not report what information they find to their customers. The trial court's ruling clearly conflicts with, and is refuted by, the decisions in *Christensen v. Commonwealth Land Title Insurance Corp* and *Jardine v. Brunswick Corp* (both *Supra*)

The Eighth District's purported effort to compel the Chapmans to arbitrate their claims was without force and effect. Commonwealth and Basin had waived any rights to arbitration by failing to timely raise those issues; by participating in discovery not allowed in arbitration; and, by successfully obtaining summary judgment dismissing virtually all of the Chapmans' claims. To now assert that the Chapmans are making a claim, and thus are subject to arbitration - when in fact all such claims have been dismissed as a matter of law (albeit erroneously) - is the literal embodiment of *chutzpah.*[5]

B. Uintah County

The focal issue in this appeal is the correct interpretation of Sec. 72-5-104, U.C.A., under two lines of judicial review. On the one hand is *Morris v. Blunt* and *Heber City v.*

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[5] In the euphemistic *Wag's Dictionary,* the term "chutzpah" is defined as killing one's mother and father and then throwing oneself upon the mercy of the Court because one now - regrettably - is an orphan.

Simpson, under which the landowner's consent or acquiescence remains a "fourth element" to dedication by user. On the other hand is *Leo Bertagnole* and *Thurman* which hold that the landowner's consent is not a "fourth element". Contrary to Uintah County's argument, Sec. 72-4-105 does not, itself, provide language governing the issue.

If, as argued by Uintah County, Sec. 72-5-104 is interpreted as a "strict liability" statute, then the judgment rendered by the Eighth District may well be proper: depending upon this Court's assessment of the witness' testimonies. Under "strict liability", it does not matter how or why the public gained access to the land on which a claimed "public road" has been dedicated by the public's use. Breaking down fences, tearing out gates - even using the road at the specific and exclusive consent of the landowner - are not material to the "public use for 10 consecutive years" under a theory of "strict liability". All that would be necessary is that the public - regardless how they did it - used the route.

If, as argued by the Chapmans and Harmston Trust, Sec. 72-5-104 is more akin to "easements by adverse use", then the Eighth District's judgment is clearly erroneous. The trial court refused to instruct the jury that landowner acquiescence and/or consent negated and vitiated claims under Sec. 72-5-104.

The defects for the "strict liability" interpretation have been cited. This interpretation, found in *Bertagnole* and *Thurman*, is based upon two Supreme Court decisions which pre-date the rendition of *Morris v. Blunt* by the Supreme Court in 1916. The concept of "strict liability" is refuted by subsequent decisions, such as *Heber City* and *Draper*. Utah law simply does not require a private landowner to barricade his property - or "man turrets with

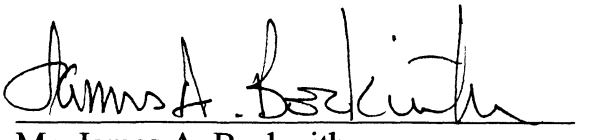
force of arms" - to repel incursions upon his property. The landowner retains authority to allow, or not allow, use of his property by express or implied consent and not thereby create rights to public use of his property.

When viewed in the original framework of *Morris v. Blunt* - that is, as more an "easement by adverse use" and not as "strict liability" - the jury verdict determining that North Wyasket Bottom Road, across the Chapman/Harmston properties, is not supported by law or by "clear and convincing" evidence. Such interepretation also highlights the defects in the County's evidence and legal argument at trial. The jury was not instructed that landowner acquiescence did not create a public road. The County's witnesses were: too remote in their memory (and thus could not specifically testify to using the road); or. used the road only after specific consent had been given to be upon the Chapman/Harmston properties without restriction; or, were Refuge visitors, or even personnel (Mr. Meacham) using the road to access the Refuge.

The Chapmans' appeal of the County's judgment is clearly not "meritless", as claimed by Uintah County. There are real and substantial policy issues to be resolved regarding the conflicting interpretations of Sec. 72-5-104. The Chapmans offer here the review of trial evidence, and trial court rulings, in harmony with the *Morris* and *Heber City* conception of that statute. There is nothing "frivolous" or "egregious" in doing so.

WHEREFORE, AND FOR THE FOREGOING REASONS, Appellants Nile Chapman and Roger Chapman pray for judgment of this Court reversing the March 5, 2001 judgment rendered by the Eighth District Court in favor of Appellees Commonwealth Land Title Insurance Co. and Basin Land Title & Abstract, Inc., and, further, Appellants Nile Chapman, Roger Chapman and the Eugene Harmston Trust pray for judgment reversing the September 25, 2001, judgment rendered by the Eighth District Court in favor of Appellee Uintah County, and, further, remand of this matter to the Eighth District Court for trial and re-trial, as applicable, together with such other and further relief as this Court deems just and proper in the circumstances.

SIGNED AND SUBMITTED this 8th day of November, 2002.



Mr. James A. Beckwith

Mr. Daniel S. Sam

CERTIFICATE OF MAILING

I, the undersigned person, do hereby certify that on this 8th day of November, 2002, I deposited two copies of the foregoing APPELLANTS' REBUTTAL BRIEF with the U.S. Postal Service, first class mail, postage prepaid, and addressed to the following:

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